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No. 82-195

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER and JUNE NOYES,
Petitioners,

v.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE*

LEE BOOTHBY
Attorney for Americans United for Separation of Church and State, Amicus Curiae
Business Address:
1310 St. Joseph Road
Berrien Springs, MI 49103
(616) 471-7787

ROBERT W. NIXON
6930 Carroll Avenue
Takoma Park, MD 20912
(202) 722-6320
Of Counsel

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Americans United for Separation of Church and State respectfully moves this Court for leave to file the accompanying Brief in this case as Amicus Curiae. The consent of the Attorney for the Petitioner herein has been obtained, but Counsel for Respondents have refused to consent to the filing of any amicus briefs.

Americans United has a large number of members who have children attending parochial schools and are concerned that the religiosity of parochial schools will be watered down in an attempt to receive tax funds. Several

members of Americans United have suits pending in various courts seeking redress for alleged infringements against their constitutional rights as citizens and taxpayers to be free of "establishment of religion." Americans United and its members believe the decision in this case will have a direct impact on the decisional law affecting such pending cases.

Americans United is particularly concerned with the decision of the Court of Appeals in the instant case because it believes that the Court's opinion extends the "child benefit" theory beyond what this Court has declared to be the verge of constitutionality.

The brief of the Amicus Curiae will argue that the Establishment Clause of the First Amendment made applicable to the states by the Fourteenth Amendment to the United States Constitution has been violated by the Minnesota law providing tax deductions for tuition paid to pervasively sectarian church schools.

Respectfully submitted,

LEE BOOTHBY
Attorney for Americans United for Separation of Church and State, Amicus Curiae
Business Address:
1310 St. Joseph Road
Berrien Springs, MI 49103
(616) 471-7787

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

"Americans United" is an organization with some forty thousand members of various religious beliefs and of no

religious belief in all states of the United States, including the State of Minnesota. Americans United is involved in extensive litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in almost every major parochiaid case coming before this Court dealing with the question of the Establishment Clause of the First Amendment to the United States Constitution, including such cases as *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), and *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

Americans United has a large number of members who have children attending parochial schools and are concerned that the religiosity of parochial schools will be watered down in an attempt to receive tax funds. Several members of Americans United have suits pending in various courts seeking redress for alleged infringements against their constitutional rights as citizens and taxpayers to be free of "establishment of religion." Americans United and its members believe the decision in this case will have a direct impact on the decisional law affecting such pending cases.

Americans United is particularly concerned with the decision of the Court of Appeals in the instant case because it believes that the Court's opinion extends the "child benefit" theory beyond what this Court has declared to be the verge of constitutionality.

SUMMARY OF ARGUMENT

This Court should reverse the Eighth Circuit's decision in *Mueller* v. *Allen*, 676 F.2d 1195 (1982), and should reaffirm *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), in which it held that tax deductions for tuition payments to pervasively sectarian elementary and secondary schools violate the Establishment Clause of the First Amendment.

In effect such tax deductions funnel state financial support to religious schools and bring to them students for religious indoctrination. This Court's approval of such aid would undermine the character and independence of religious schools, open the public treasury to further demands of pervasively sectarian institutions, spawn a whole new generation of parochiaid litigation, and permit additional struggles between civil and religious authorities and institutions over tax funding and conflicts between religion and public policy and controls.

ARGUMENT

THE MINNESOTA TAX DEDUCTION FOR TUITION PAYMENTS, ALTHOUGH FACIALLY NEUTRAL, NEVERTHELESS VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Court of Appeals for the Eighth Circuit in the instant case, *Mueller* v. *Allen*, 676 F.2d 1195 (1982), reaches a result exactly opposite to that reached by the First Circuit in *Rhode Island Federation of Teachers* v. *Norberg*, 630 F.2d 855 (1st Cir. 1980). As the Eighth Circuit noted, the state tax laws in both Minnesota and Rhode Island are practically identical in permitting a

parent of parochial-school students to deduct from gross income for state tax purposes payments made for tuition to church schools, textbooks, and school transportation.

The Eighth Circuit stated that the issue raised is significant not only for the State of Minnesota but to the nation as well. *Mueller, supra* at 120. If this Court sustains the Eighth Circuit's decision, it will open a church-state Pandora's box and permit further raids on the public treasury for the benefit of pervasively sectarian institutions. Such a decision surely would spawn a whole new episode of parochiaid litigation. But if this Court sustains the reasoning of the First Circuit, it will reaffirm the limits it already has mapped out in the parochiaid area. *See* Howard, Baker, & Derr, *Church, State, and Politics* 33 (1981).

In this case the Eighth Circuit subtly seeks to extend further the "child benefit" doctrine inherent in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and embraced in *Board of Education* v. *Allen*, 392 U.S. 236 (1968). The Court of Appeals, by this device, attempts to sidestep the holding of this Court in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

This Court in *Nyquist* denied the constitutionality of income tax deductions for tuition paid to parochial schools. This Court reasoned that in practical terms for purposes of determining whether such aid has the effect of advancing religion, there is little difference between such tax benefits and tuition reimbursements. In both cases the parents received the same form of encouragement and reward for sending their children to parochial schools. In both instances the money involved represents a charge made upon the state for the purpose of religious education. *Id.* at 790-91.

In the instant case the Eighth Circuit attempted to create a constitutional distinction between the Minnesota statute and the New York statute reviewed in *Nyquist*, stating:

> In *Nyquist* it was urged that the fact that the New York tax credit was directed to the parent rather than to the schools was controlling. The Court, however found that this distinction from *Everson* and *Allen* was not determinative, that it was but one among many factors to be considered. 413 U.S. at 781. A more significant factor that may be extrapolated from *Allen* and *Everson* is the fact that those cases dealt with benefits available to *all* school children, whereas the tax benefit in *Nyquist* was given only to those parents with children in private schools. . . . Thus, the New York statute in *Nyquist* can be distinguished from the Minnesota and Rhode Island statutes on the following basis: . . . the tax benefits in *Nyquist* were limited to the class of parents of private school children, as opposed to the broad class of parents with dependents in both public and nonpublic schools benefited under the Minnesota and Rhode Island statutes.

Mueller, supra at 1203.

In *Everson* this Court acknowledged that the contribution of tax funds for the support of an institution which teaches the tenets of any church is unconstitutional, but reasoned that providing free transportation to children was a safety measure analogous to providing police and fire protection and streets and sidewalks serving churches and parochial schools. In characterizing these public services, this Court stated they were "separate and . . . indisputably marked off from the religious function." *Everson, supra* at 18.

Transportation is in and of itself secular. It may be argued that its principal effect is to get children to school,

rather than to inculcate any theistic ideas, provided that the transportation is generally available to all students and is not limited principally to parochial school students.

In *Everson* this Court, however, said that a state "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Id.* at 16. It is clear that the statute in *Everson, in fact,* extended to students attending church schools transportation services already enjoyed by public-school students. The *effect* of the New York law thus arguably could be deemed to benefit all children by providing them with safe travel to and from school.

Since *Everson* it has been recognized that any arrangement for public benefits to private elementary and secondary schools, including pervasively sectarian schools, carries with it a presumption of constitutional invalidity. *See Tuition Tax Credits Debate,* 7 Hastings Constitutional Law Quarterly 523, 529 (1980).

In *Allen* this Court upheld a New York textbook loan statute which provided for the furnishing of textbooks to students attending both public and private schools. Appellants in *Allen* sought only a declaration that the statute was invalid on its face. *Allen* did not deal with the question of whether the statute was unconstitutionally administered and applied since it was the school board itself that sought judicial relief. *Allen, supra* at 240.

This Court in *Allen* noted that the record was "meager," *id.* at 243, and came before the Court "after summary judgment entered on the pleadings." Significantly, the Court observed that the record contained no evidence that any private schools had previously provided textbooks for their students but that there was some evidence

that they had not. *Id.* at 244, n. 6. The *Allen* Court further observed that there was "[n]othing in this record [that] supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial school to teach religion." *Id.* at 248.

In the case of textbook loans, if the school never furnished the textbooks and if the parents always had furnished the school books, the textbook loan would bring financial assistance to the parent. Though this would make it easier to keep the child in the parochial school, the benefit would not as directly financially benefit the religious school. Also, if only secular textbooks are furnished at least an argument can be made that the books loaned to the students do not aid religion.

There was, of course, good reason why this Court in *Allen* noted there had been no showing that the parochial schools had, prior to the textbook law, furnished textbooks at the schools' own expense. If the record had so indicated, there would have been a more immediate benefit to the parochial school. The state would be providing financial aid to the school rather than to the child even though the books technically were loaned to students.

In the instant case the benefit to religious schools is not as remote. The benefit provided the parents has a much more direct bearing on the financial relationship between the parent and the parochial school. The deduction could be literally the instrument to funnel aid from the state to the school.

While assisting students who attend parochial schools and their parents, the Minnesota legislation also provides an invaluable aid to religious schools by bringing to them and their religious programs the very students for whom

the schools were established. *Gaffney* v. *State Department of Education*, 192 Neb. 358, 220 N.W.2d 550, 555 (1974). *See also McCollum* v. *Board of Education*, 333 U.S. 203,. 212 (1948).

The parochial schools themselves would have a direct interest in any tax benefit provision which might be used as a conduit for aid to such schools. As acknowledged by this Court in *Nyquist*, there is no constitutional distinction between tuition reimbursement and tax deductions. Both ultimately act as a reimbursement to the tuition-paying parent. In both cases the state would be helping to pay for religious education.

In *Nyquist*, this Court discussed its earlier decision in *Allen*, noting:

> The Court there [Allen] repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature. . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law."

Nyquist, *supra* at 782.

Commenting on *Allen* in *Meek* v. *Pittenger*, 421 U.S. 349, 361 (1975), the Court observed that under the New York law, the textbooks that would be loaned were limited to those " 'designated for use in any public, elementary, or secondary schools of the state or are approved by any boards of education, trustee, or other school authorities.' "

And this Court in *Nyquist*, *supra* at 781-82, observed that in *Allen* it "repeatedly emphasized that upon the record . . . there was no indication that textbooks would be provided for anything other than purely secular courses." The Court also found that "restrictions of textbooks to those provided the public schools is sufficient to insure that the books will not be used for religious purposes."

In *Wolman* v. *Walter*, 433 U.S. 229, 251, n.18 (1977), this Court also noted that "[i]n more recent cases, however, we have declined to extend that presumption of neutrality to other items in the lower school setting." The Court stated that although it had been argued that the Court should extend *Allen* to cover all items similar to textbooks, when faced with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles advanced in the Court's subsequent cases, the Court would choose the latter course. *Ibid.*

Allen, like *Everson*, validated a program which *in fact* only extended to students attending private schools textbooks such as were already being furnished to public school students. Thus, in both *Everson* and *Allen* all students were in fact actually receiving the benefits.

There is no similarity between the tuition tax deduction plan here under review and the statutes scrutinized by this Court in *Everson* and *Allen*. It can be argued that the benefits provided in both *Everson* and *Allen*, were secular in nature — transportation and books used in secular courses of study. Here the benefit granted by the state relates to the payment for both secular and religious education. Unlike the statutes under review in *Everson* and *Allen*, under the Minnesota and Rhode Island statutes providing for tax deduction for the payment of tui-

tion, textbook, and transportation expenses, a charge is permitted to be made against the state for religious purposes. In fact, the tax benefit to which a parent would be entitled includes payments made to pervasively religious schools. Since there is no way of insuring that the tax benefit and resulting aid to the parochial school would cover only secular services, the statute is invalid. *Committee for Public Education* v. *Regan*, 444 U.S. 646, 659 (1980).

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court in essence held that church-affiliated elementary and secondary schools are pervasively religious or sectarian, thus preventing government grants to partially finance teachers of non-religious or secular subjects in such schools.

In *Meek* v. *Pittenger*, *supra* at 366, this Court recognized that "[t]he very purpose of many of those [church related elementary and secondary] schools is to provide an integrated secular and religious education." The most Reverend William E. McManus, co-chairman of the United States Catholic Conference Ad Hoc Committee on School Aid, stated the same concept this way:

> The Catholic Bishops of the United States are on record in favor of Catholic schools. The Bishops have said in the plainest possible language: Of all education programs available to the Catholic community, Catholic schools afford the best opportunity to realize the central purpose of Christian education among children and young people. Only in such schools can they experience learning and living fully integrated in the light of faith. This integration of religious truth and values with life distinguishes the Catholic schools from all other schools. . . .

McManus, *Felix Culpa — Report from the Ad Hoc Committee on School Aid*, 20 Catholic Lawyer 354 (1974).

Subsequent to *Lemon*, a three-judge panel in *Public Funds for Public Schools of New Jersey* v. *Marburger*, 358 F.Supp. 29, 33-34 (D.N.J. 1974), *aff'd*, 417 U.S. 961 (1973), quoting *Allen* and *Lemon* stated:

> While in some instances it may be that religious values do not affect the content of the secular education provided by these institutions, it is clear that the purposes of such religious-affiliated schools is, in substantial part, to teach and thus advance a given religious faith. The Supreme Court has "long recognized that religious schools pursue two goals, religious instruction and secular education". . . . "[T]he raison d'etre of parochial schools is the propagation of a religious faith."

In *Meek* v. *Pittenger*, *supra* at 364, this Court agreed that as "part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities." This Court, however, confined such permissible aid to "secular and nonideological services unrelated to the primary, religious-oriented educational function of the sectarian school." *Ibid.* Here, under the Minnesota statute, the aid would not be isolated to the secular sphere but would benefit both the parent and pervasively sectarian institutions.

It is respectfully submitted that the opinion of the Eighth Circuit in *Mueller* v. *Allen* places form over substance. On the other hand the First Circuit's decision in *Rhode Island Federation of Teachers* v. *Norberg*, *supra* at 961, recognizes that the legislation, regardless of its carefully drafted language, failed to benefit a class having primarily secular characteristics.

It is the general rule that regardless of the language in which a statute is framed, its purpose and its constitutional validity must be determined by its natural and

reasonable effect. 11 Am. Jur. Constitutional Law § 101, p. 735; *Almond* v. *Day*, 89 S.E.2d 851, 857 (Va. 1955).

Here, apparently to avoid charges of aid to religion, the classification was carefully crafted. However, the attempt fails because it rests entirely upon legislative classifications which are easily manipulated. As the district court stated in *Norberg*, the fact that the statute was made applicable to parents of public as well as nonpublic school students was "mere window dressing." 479 F.Supp. 1364, 1371 (D. R.I. 1979).

The analysis by the Eighth Circuit in *Mueller* runs into serious trouble partly because the Court apparently failed to explore and determine whether the law had a primary *effect* of advancing religion without reference to its legislative purpose.

This Court has declared that a secular purpose and a facial neutrality may not be enough. A court upon a First Amendment challenge must give the effect of the legislation its careful scrutiny. *Nyquist*, *supra* at 794-98, *Meek* v. *Pittenger*, *supra* at 365, n.15.

Despite the fact that the courts have used the phrase "principal or primary effect" as used in *Lemon*, *supra* at 612, there is no requirement that the court determine whether some permissible effect is the "primary" effect of the law. Rather, unless the unconstitutional effect is "remote and incidental," the Establishment Clause is violated. *Nyquist*, *supra* at 784, n. 39, quoting *McGowan* v. *Maryland*, 366 U.S. 320, 450 (1961). This gloss on the primary effect test can be explained by the fact that the First Amendment prohibits laws "respecting an establishment" of religion, which was noted and emphasized in *Lemon* itself.

The fact that state aid is given in either the form of tuition reimbursements or by tax deductions is not constitutionally significant. The Eighth Circuit attempts to avoid the consistent holdings of this Court where the apparent effect of the legislation is to provide aid to church-operated elementary and secondary schools by focusing not on its effect but on the claimed facial neutrality of the law. However, "[t]he state may not . . . pay for what is actually a religious education, even though it purports to be paying for a secular one, and *even though it makes its aid available to secular and religious institutions alike.*" *Roemer* v. *Board of Public Works*, 426 U.S. 736, 747 (1976) (Emphasis added).

Tilton v. *Richardson*, 403 U.S. 672 (1971), resolved any lingering doubt as to the scope of the effect test. As explained in *Nyquist*, *supra* at 783-84, n. 39:

> Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the plurality found that the *mere possibility* that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "*in part* have the effect of advancing religion." 403 U.S. at 683 (First emphasis supplied, second emphasis inserted in *Nyquist*).

Here there is not the mere possibility but rather the probability that the tax benefit provision will, in great part, have the effect of advancing religion.

This Court also should recognize that considerable competition exists between public and private education. *See* McManus, *Felix Culpa*, *supra* at 354-56. The primary beneficiaries of the tuition-tax deduction would be those schools, primarily sectarian, which charge tuition. Once this Court permits the wall of separation to be further pierced by such a scheme, the demand by sectarian school

interests will inevitably increase in the political arena. Of course, the ultimate effect of aid to sectarian education could be the undermining of the religious character and independence of religious schools. Mr. Justice Stewart, dissenting, in *Roemer* v. *Board of Public Works of Maryland*, *supra* at 775, warned of "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission. At the same time the tendency to control that which is state aided will naturally follow with the political and religious processes once again assaulted by the inevitable struggle between civil and ecclesiastical authorities.

In addition, state policy might well disapprove of tax deductions for tuition payments to religious schools that are perceived to discriminate on the basis of either race or creed. State educational and taxing authorities may attempt to impose their views on matters such as teacher certification and school standards on unwilling sectarian schools that find such state regulation contrary to their religious beliefs.

Tax audits would surely follow, not only of the parents-taxpayers, but also of recipient schools. Such state inquiries would not be triggered by an institution's election to claim the benefits of tax exemption but rather from the parent's decision to take the tax deduction. Schools that have historically rejected all forms of state assistance thus unwillingly would be subject to the chilling winds of state intrusion and control.

In its opinion in *Mueller*, *supra* at 1205, the Court of Appeals claimed that this tax-deduction law "falls in the gray area lying between constitutionally-upheld tax exemptions . . . and unconstitutional tax 'credits.' "

It is difficult to see how this case comes anywhere close to the tax-exemption case of *Walz* v. *Tax Commission of*

the City of New York, 397 U.S. 664 (1970). In *Walz* this Court determined that "[t]he hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches." *Id.* at 675.

It is one thing to withhold the taxation of church property. It is quite another to permit a charge to be made upon the state through the granting of a tax deduction or by providing for tuition reimbursements. The former simply spares the exercise of religion from the burden of property taxation, *id.* at 673, and perhaps is even required by the Free Exercise Clause. *Id.* at 692, n. 12. (Mr. Justice Brennan, concurring). The latter is the affirmative granting of a reward not required by the Free Exercise Clause. In addition, unlike church taxation, there would be no church-state entanglement by voiding the tax-deduction provision. Conversely, excessive governmental entanglement with the religious interests of the taxpayer and the parochial school may well be the fruit of a tax deduction for tuition, textbooks, and transportation, which can only be verified by tax audit.

The basic weakness in the application of the child benefit concept such as here applied is that it permits public funds to be used for strictly religious purposes. Any further expansion of the child benefit concept would virtually eradicate any limitations on state aid to sectarian schools. The doctrine may be used to justify any type of aid because there is no logical stopping point. *See California Teachers Association* v. *Riles*, 176 Cal. Rptr. 300, 29 Cal.3d 794, 632 P.2d 953 (1981).

If the reasoning of the Eighth Circuit is affirmed by this Court, tax funds could be used for religious purposes so long as the funds are laundered through a child or his parents and made available for both public and parochial school charges.

CONCLUSION

For the reasons stated above, the decision of the Eighth Circuit should be reversed.

Respectfully submitted,

LEE BOOTHBY
Attorney for Americans United for Separation of Church and State, Amicus Curiae
Business Address:
1310 St. Joseph Road
Berrien Springs, MI 49103
(616) 471-7787

ROBERT W. NIXON
6930 Carroll Avenue
Takoma Park, MD 20912
(202) 722-6320
Of Counsel

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